Nos. 13-990 and 13-991

IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

—v.—

NML CAPITAL, LTD., et al.,

Respondents.

EXCHANGE BONDHOLDER GROUP,

Petitioner,

—v.—

NML CAPITAL, LTD., et al.,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE UNITED MEXICAN STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

JAMES L. KERR
Counsel of Record
KAREN E. WAGNER
DANIEL T. YOUNG
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
james.kerr@davispolk.com
(212) 450-4000

Counsel for Amicus Curiae

March 24, 2014

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

BACKGROUND 5

SUMMARY OF ARGUMENT................................... 8

ARGUMENT 10

I. THE FSIA'S LIMITATIONS ON ENFORCEMENT CANNOT JUSTIFY INJUNCTIVE RELIEF DESIGNED TO THWART THOSE LIMITATIONS 10

A. The Injunctions Abrogate the FSIA's Protections of Immune Property............. 11

B. The Injunctions Violate Fundamental Principles of Comity 16

II. THE INJUNCTIONS ARE PROFOUNDLY INEQUITABLE................. 18

III. COLLECTIVE ACTION CLAUSES DO NOT ELIMINATE FUTURE HOLDOUT THREATS TO THE ORDERLY RESTRUCTURING OF SOVEREIGN DEBT 22

CONCLUSION... 28

TABLE OF AUTHORITIES

CASES

Page(s)

Af-Cap, Inc. v. Republic of Congo,
462 F.3d 417 (5th Cir. 2006)..........................11, 12

Aurelius Capital Partners, LP v. Republic of Argentina, No. 10-837-cv (L), slip op.
(2d Cir. Mar. 24, 2010)..11

Autotech Techs. LP v. Integral Research & Dev. Corp.,
499 F.3d 737 (7th Cir. 2007)................................16

FG Hemisphere Assocs., LLC v. Democratic Republic of Congo,
637 F.3d 373 (D.C. Cir. 2011)..............................11

Gen. Bldg. Contractors Ass'n, Inc. v. Penn.,
458 U.S. 375 (1982)..21

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,
527 U.S. 308 (1999)....................................... 18-19

Hilton v. Guyot,
159 U.S. 113 (1895)..16

TABLE OF AUTHORITIES

Page(s)

In re Estate of Ferdinand Marcos Human Rights Litig., 94 F.3d 539 (9th Cir. 1996) 17

Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) 16

NML Capital, Ltd. v. Banco Central de la República Argentina, 652 F.3d 172 (2d Cir. 2011) 5

NML Capital, Ltd. v. Republic of Argentina, No. 08 Civ. 6978 (TPG), 2011 WL 9522565 (S.D.N.Y. Dec. 7, 2011) 5-6

NML Capital, Ltd. v. Republic of Argentina, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Feb. 23, 2012) (Dkt. No. 371) 6

NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012) 5, 6, 8, 13, 22-23

NML Capital, Ltd. v. Republic of Argentina, No. 08 Civ. 6978 (TPG), 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012) 8

NML Capital, Ltd. v. Republic of Argentina, 727 F.3d 230 (2013) 8, 15

TABLE OF AUTHORITIES

Page(s)

Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co., 476 F.3d 140 (2d Cir. 2007) 12

Penn. Coal Co. v. Mahon, 260 U.S. 393 (1922)..21

Peterson v. Islamic Republic of Iran, 627 F.3d 1117 (9th Cir. 2010)........................12, 14

Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian, 218 Cal. App. 3d 1058 (1990) 14

Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945)...21

S & S Mach. Co. v. Masinexportimport, 706 F.2d 411 (2d Cir. 1983) 15

Schooner Exchange v. McFadden, 11 U.S. 116 (1812)..10

United States v. Alexander, 736 F. Supp. 1236 (N.D.N.Y. 1989).....................22

United States v. Crawford Enters., Inc., 643 F. Supp. 370 (S.D. Tex. 1986).......................12

TABLE OF AUTHORITIES

Page(s)

Statutes

28 U.S.C. § 1602 2

28 U.S.C. § 1609 ....7, 12, 16

28 U.S.C. § 1610 ....7, 12, 16

28 U.S.C. § 1610(a)..11

28 U.S.C. § 1611 ....2, 7

28 U.S.C. § 1611(b)(1) 13

Treaties

Consular Convention between the United States and the United Mexican States, 57 Stat. 800; T.S. 985; 9 Bevans 1076; 125 U.N.T.S. 301 1

Treaty Establishing the European Stability Mechanism (ESM), Feb 2, 2012, ch. 4, art. 12, ¶3, 2011 O.J. (L 91) 26

TABLE OF AUTHORITIES

Page(s)

United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res 59/38, U.N. Doc A/RES/59/38 (Dec. 2, 2004) 17

Vienna Convention on Consular Relations, 21 U.S.T 77; T.I.A.S. 6820; 596 U.N.T.S. 261 1

BRIEFS

Br. of United States as *Amicus Curiae*, *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417 (5th Cir. 2006) (No. 05-51168) 17

Br. of United States as *Amicus Curiae* in Support of Appellant, *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373 (D.C. Cir. 2011) (No. 10-7046), 2010 WL 4569107 17-18

Br. of United States as *Amicus Curiae* in Support of Reversal, *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105-cv(L)), 2012 WL 1150791 .... 7, 24

TABLE OF AUTHORITIES

Page(s)

Br. of United States as *Amicus Curiae* in Support of the Republic of Argentina's Petition for Panel Rehearing and Rehearing *En Banc*, *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105-cv(L)), 2012 WL 6777132 ....7, 17, 24, 26

Statement of Interest of the United States, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 2002 Civ. 5932 (TPG) (S.D.N.Y. Jan. 12, 2004), 2004 WL 5475206 ....3, 24

OTHER AUTHORITIES

Michael Bradley, James D. Cox & Mitu Gulati, *The Market Reaction to Legal Shocks and Their Antidotes: Lessons from the Sovereign Debt Market*, 39 J. Legal Stud. 289 (2010) 26

George Luther Clark, Equity: An Analysis and Discussion of Modern Equity Problems § 169 (1919)...22

Anna Gelpern, Peterson Inst. for Int'l Econ., No. PB13-12, Sovereign Damage Control (May 2013) 20

TABLE OF AUTHORITIES

Page(s)

Group of Ten, Report of the G-10 Working Group on Contractual Clauses (Sept. 26, 2002), *available at* http://www.bis.org/publ/gten08.pdf. 24-25

Int'l Capital Markets Ass'n, Sovereign Bond Consultation Paper (Dec. 2013), *available at* http://www.icmagroup.org/assets/documents/Maket-Practice/Regulatory-Policy/Sovereign-Debt-Information/ICMA-Sovereign-Bond-Consultation-Paper-79801-5-863-v1-8-161213.pdf 27

Int'l Monetary Fund, Collective Action Clauses in Sovereign Bond Contracts—Encouraging Greater Use (June 6, 2002), *available at* https://www.imf.org/external/np/psi/2002/eng/060602a.pdf. 24

Int'l Monetary Fund, Collective Action Clauses: Recent Developments and Issues (Mar. 5, 2003), *available at* http://www.imf.org/external/np/psi/2003/032503.pdf. 25

TABLE OF AUTHORITIES

Page(s)

Int'l Monetary Fund, Sovereign Debt Restructuring—Recent Developments And Implications for the Fund's Legal and Policy Framework (Apr. 26, 2013), *available at* https://www.imf.org/external/np/pp/eng/2013/042613.pdf 23, 24, 26, 27

Restatement (Third) of the Foreign Relations Law of the United States § 431 cmt. d (1987) 17

Restatement (Third) of the Foreign Relations Law of the United States § 481 cmt. b (1987) 17

1 Joseph Story, Commentaries on Equity Jurisprudence § 12 (1836) 19

W. Mark C. Weidemaier & Mitu Gulati, *A People's History of Collective Action Clauses*, 54 Va. J. Int'l L. 51 (2013) (symposium).......25, 28

11 R. Lord, Williston on Contracts § 32:18 (4th ed. 2002) 21

The United Mexican States respectfully submit this brief as *amicus curiae* in support of the petitions filed in Case No. 13-990 and Case No. 13-991.[1]

INTEREST OF *AMICUS CURIAE*

Mexico views with concern the decision of the Court of Appeals for the Second Circuit, pursuant to which a United States court has empowered private bondholders to jeopardize the economy of a sovereign nation.[2] The decision mandates payment, at face

---

[1] Pursuant to Supreme Court Rule 37, counsel of record for all parties received notice at least ten days prior to the due date of this brief of *amicus curiae*'s intention to file the brief. All parties have consented to the filing of the brief and the parties' consent letters are being filed herewith. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No persons or entities other than the *amicus*, its members, or their counsel made a monetary contribution to the preparation or submission of the brief.

[2] Nothing in this Brief shall be construed as a waiver of the immunity to which Mexico is entitled by virtue of international law or the Foreign Sovereign Immunities Act, or any immunity or privilege established by the Vienna Convention on Consular Relations, 21 U.S. Treaties 77; Treaties and Other International Acts Series 6820; 596 United Nations Treaty Series 261, and the Consular Convention between the United States and the United Mexican States, 57 Stat. 800; Treaty Series 985; 9 Bevans 1076; 125 United Nations Treaty Series 301, or of any defense, right, or immunity which Mexico may have a right to assert, nor as submission to the jurisdiction of the United States.

value and with immune assets, of defaulted debt acquired by opportunistic holdouts at a fraction of face value, and enforces this mandate by threatening third-party intermediaries with contempt unless they refuse to engage in normal financial transactions with regard to legally enforceable payment obligations on restructured debt. The decision also places at risk the value of the deeply discounted restructured bonds held by the 92 percent majority of bondholders who participated in good faith in Argentina's 2005 and 2010 exchange offers, including the Exchange Bondholder Group, by engendering a material risk of another default. By increasing holdout leverage, by creating incentives for holdouts to pursue windfall profits at the expense of exchange offer participants, and by discouraging exchange offer participation for fear that holdouts will be able to interrupt the payment of restructured debt, the decision will inevitably render future restructurings of sovereign debt more difficult.

This unprecedented remedy violates the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (the "FSIA"), is flatly inconsistent with principles of international comity, and is directly contrary to the stated policy of the United States of America.[3]

Mexico has a significant interest in this case. Mexico is a foreign state within the meaning of the FSIA and maintains full diplomatic and consular relations with the United States. Mexico regularly accesses U.S. capital markets and currently has outstanding $37.7 billion in U.S.-dollar denominated debt governed by New York law. To participate in the U.S. markets, Mexico chooses to waive its sovereign immunity, but Mexico does so in reliance upon the FSIA, which sets known bounds upon any challenge in the courts of the United States to its immunity and the immunity of its property. The decision below, by sanctioning litigation designed to evade the protections of the FSIA, changes those rules and undermines the statute itself.

Mexico's interest flows as well from its informed perspective as an inaugural member of the International Monetary Fund ("IMF"), and as a participant in its own sovereign debt offerings and

---

[3] *See* Statement of Interest of the United States at 2, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 2002 Civ. 5932 (TPG) (S.D.N.Y. Jan. 12, 2004), 2004 WL 5475206 ("U.S. 2004 Br.") (stating that "such enforcement mechanisms would have adverse consequences on the prospects for voluntary debt restructuring and on the stability of international financial markets," and that "such enforcement mechanisms [are] contrary to United States policy.").

restructurings. Mexico is thus well positioned to disagree with a stated foundation for the Court's reasoning: that contract provisions in sovereign debt instruments known as "collective action clauses," or "CACs," will limit the decision's ramifications to Argentina alone. CACs permit a specified majority of bondholders to adjust the terms of sovereign bonds. While Mexico adopted CACs for its own external debt instruments in 2003, and was the first nation to do so in the modern era, Mexico also understands that CACs have clear limitations and will not eliminate the threat to orderly debt restructuring engendered by the decision below. In addition, Mexico—like other nations—has legacy debt obligations with no CAC protection at all.

Mexico believes that the FSIA provides the enforcement structure within which these debt obligations (and their restructuring) must operate. While holders of defaulted debt will surely continue trying to profit in future restructurings by challenging the accepted construction of boilerplate contract provisions, they should not be permitted to circumvent the FSIA. The decision of the Court of Appeals allows them to do exactly that, and places the economic policies of a sister sovereign nation at the mercy of holdout creditors in a way never contemplated under the FSIA. Mexico respectfully asks the Court to review this extraordinary and unsupportable use of a court's equitable power.

BACKGROUND

This litigation arises out of Argentina's 2001 default on its external public debt. *See NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 175-78 (2d Cir. 2011) (providing background). After announcing a moratorium on approximately $80 billion of external public debt in December 2001, *id.* at 175, Argentina restructured that debt in 2005 and 2010, *id.* at 176 n.4. Creditors holding defaulted bonds were permitted to exchange them for new securities issued at a substantial discount. Approximately 92 percent of Argentina's restructured debt is now held by these "Exchange Bondholders." *See id.*

The defaulted bonds contained a *pari passu* clause, common in many debt instruments.[4]

In December 2011, the United States District Court for the Southern District of New York ruled that the *pari passu* clause in Argentina's bonds required holdout creditors to be paid in full whenever holders of Argentina's restructured debt received payment on their debt. *See NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978

[4] The language of the clause appears in Argentina's 1994 Fiscal Agency Agreement. *See NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 251 (2d Cir. 2012). Several of Mexico's own bonds contain *pari passu* clauses, albeit in a different form.

(TPG), 2011 WL 9522565, at *2 (S.D.N.Y. Dec. 7, 2011). The court subsequently issued a mandatory injunction requiring Argentina to make such payments, and a parallel injunction prohibiting Argentina and third-party financial institutions from servicing the debt restructured in 2005 and 2010 if the holdout creditors were not paid at least simultaneously. *See NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Feb. 23, 2012) (Dkt. No. 371) (order granting injunctions).

In October 2012, the Second Circuit upheld the district court's interpretation of the *pari passu* clause. 699 F.3d at 258-59. The Court also upheld the unprecedented injunctive relief crafted by the district court. *Id*. at 265. The Court determined that, because the remedy of specific performance simply directed Argentina to comply with its contractual obligations and did not involve the court's seizure and control of specific property, the injunctions did not violate the enforcement provisions of the FSIA. *Id*. at 262-63.

Before the Second Circuit, the United States objected to this remedy on several grounds. The United States noted that the Court's construction of the *pari passu* provision contradicts settled market understanding of such provisions[5] and "imperils the United States' efforts to promote voluntary debt restructuring[.]"[6] The United States argued that, by constraining Argentina's use and disposition of sovereign property outside the United States that is immune from "attachment arrest and execution," the injunction "contravene[d]" the FSIA, U.S. *En Banc* Br. at 6,[7] and risked harm to U.S. foreign relations.[8]

---

[5] *See* Br. for the United States as *Amicus Curiae* in Support of Reversal at 10-17, *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105-cv(L)), 2012 WL 1150791 (hereinafter "U.S. Panel Br."); Br. for the United States as *Amicus Curiae* in Support of the Republic of Argentina's Petition for Panel Rehearing and Rehearing *En Banc* at 1-3, *NML Capital*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105-cv(L)), 2012 WL 6777132 (hereinafter "U.S. *En Banc* Br.").

[6] U.S. Panel Br. at 17; *see also* U.S. *En Banc* Br. at 4 ("[T]he creation of new rights and new vehicles for enforcement alters and destabilizes the landscape of sovereign debt restructuring.").

[7] *See also* U.S. Panel Br. at 28 (litigants cannot "sidestep sections 1609-1611 by seeking an injunction that restrains the sovereign's use of immune assets . . . .").

[8] *See* U.S. Panel Br. at 28 (the injunctions "could cause heightened tensions in our foreign relations"); U.S. *En Banc* Br. at 7-8 ("U.S. foreign relations may be harmed by a holding constraining a foreign state's use of its property outside the United States, particularly such property inside the foreign state's territory.").

In October 2012, the Second Circuit remanded for the district court to clarify the "ratable payment" formula and the impact of the injunctions on third-party financial institutions. 699 F.3d at 265. On remand, the district court issued final permanent injunctions. These injunctions direct Argentina, when it makes the next interest payment on the exchange bonds, to "pay plaintiffs approximately $1.33 billion." No. 08 Civ. 6978 (TPG), 2012 WL 5895786, at *2 (S.D.N.Y. Nov. 21, 2012). The court confirmed that third-party financial intermediaries—including global clearing systems located in Belgium and Luxembourg—could face contempt if Argentina were not to comply. *Id.* at *5.

On August 23, 2013, the Second Circuit affirmed these injunctions. 727 F.3d 230, 248 (2d Cir. 2013). The panel reaffirmed its earlier holding that the injunctions do not violate the FSIA, as they "allow Argentina to pay its FAA debts with whatever resources it likes." *Id.* at 240-41.

This appeal followed.

SUMMARY OF ARGUMENT

Mexico is a sovereign borrower. When borrowing in the U.S. capital markets, Mexico relies upon settled interpretations of the FSIA. The decision of the Court of Appeals critically undermines a key principle upon which the sovereign debt market depends: that sovereign property outside of the

United States, particularly property within the sovereign state itself, is immune from restraint or disposition pursuant to the order of a U.S. court. The decision also vitiates the fundamental principle of U.S. law that injunctive remedies are not available to force payment of defaulted debt, or to prohibit payment of valid restructured debt. This general rule is of even greater significance when an injunction targets a sovereign's immune property outside the United States. For all of the reasons set forth below, the decision of the Court of Appeals can be seen as imperiling Mexico's interests as a sovereign issuer of debt, and merits review.

First, the injunctions violate the FSIA's grant of immunity to sovereign property outside the United States and within a sovereign's own borders by compelling Argentina either to use its immune reserves to make payments to holdout bondholders, or to default on its restructured debt.

Second, the injunctions are incompatible with comity among nations, a doctrine to which the United States has long subscribed.

Third, the exercise of a court's equitable power to enforce a contract for the payment of money is inequitable, especially where the result is to provide a significant economic premium to holdouts who refused to participate in the voluntary restructuring of Argentina's debt at the expense of the 92 percent majority of bondholders who did. The injunctions will inevitably have a negative impact on future sovereign debt restructurings and risk destabilizing the international monetary system.

Fourth, Mexico disagrees with the Court of Appeals' conclusion that the post-2003 use of CACs has eliminated the holdout creditor problem. That assumption ignores the limitations of the CACs found in the existing stock of New York-law governed debt, including Mexico's. None of those CACs provide for cross-series aggregation, and thus leave a restructuring of this debt vulnerable to holdout disruption. In addition, debt issued without CACs before 2003 will remain outstanding for years to come.

ARGUMENT

I. THE FSIA'S LIMITATIONS ON ENFORCEMENT CANNOT JUSTIFY INJUNCTIVE RELIEF DESIGNED TO THWART THOSE LIMITATIONS

The FSIA embodies the law of the United States regarding sovereign immunity. The FSIA also embodies principles of comity that have been a part of this Court's jurisprudence since the founding of the Republic. *See Schooner Exchange v. McFadden*, 11 U.S. 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute."). Both preclude the issuance of an injunction that limits or controls a sovereign's use of property not held for commercial activity within the United States.

A. The Injunctions Abrogate the FSIA's Protections of Immune Property

Under the FSIA, sovereign assets are immune from attachment or execution unless they constitute "property in the United States of a foreign state" that are "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). Courts have repeatedly recognized the limits that the FSIA places on their ability to reach assets abroad. *See, e.g.*, *Aurelius Capital Partners, LP v. Republic of Argentina*, No. 10-837-cv (L), slip op. at 2 (2d Cir. Mar. 24, 2010) (affirming *vacatur* of TRO, and finding it unlikely that custodial accounts located in Argentina and used to pay pensioners were "being used for commercial activity in the United States.").

As a consequence, "a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution." *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011). This result will necessarily leave some litigants frustrated because it creates "[r]ights [w]ithout [r]emedies" against foreign sovereigns. *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 429 (5th Cir. 2006). But this dichotomy is by congressional design, and reflects the limited incursion on absolute sovereign immunity effected by the FSIA.

Congress "fully intended to create rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments." *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010). And courts have long recognized that the FSIA limits their ability to enforce against sovereigns court orders for civil or criminal contempt that would result in monetary penalties. *See, e.g.*, *Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co., Ltd.*, 476 F.3d 140, 144 (2d Cir. 2007) (affirming denial of contempt motion on the grounds of foreign sovereign immunity); *Af-Cap*, 462 F.3d at 428-29 (same).[9] The injunctions cannot therefore be sustained.

The holdouts are frustrated by this statutory design. They have judgments against Argentina, but presumably have been unable to find sufficient commercial Argentine property within the United

---

[9] Mexico has itself invoked sovereign immunity in this context. *See United States v. Crawford Enters., Inc.*, 643 F. Supp. 370, 382 (S.D. Tex. 1986), *order aff'd, appeal dismissed sub nom. Petróleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392 (5th Cir. 1987) (noting that the court was "severely impaired" in fashioning a contempt order against a sovereign instrumentality of Mexico in light of such an order's lack of enforceability abroad (citing 28 U.S.C. §§ 1609-10)).

States to satisfy their judgments, and U.S. courts cannot order execution against immune property within Argentina or otherwise outside the United States. Accordingly, the holdouts have obtained injunctions, characterized as "specific performance" of the defaulted debt, compelling Argentina to use otherwise immune property located in Argentina or elsewhere to pay the holdouts. The Court's orders give Argentina limited ways to avoid contempt: surrender to the holdouts the rights of sovereign immunity given to its property by the FSIA, or default on its restructured debt.

Because the injunctions deprive Argentina of control over presumptively immune property as effectively as would the "attachment arrest and execution" of that property, the injunctions plainly violate the FSIA.[10] Other courts have for that reason

[10] The Second Circuit concluded, inexplicably, that the injunctions "would not deprive Argentina of control over any of its property," because "they affect Argentina's property *only incidentally*" and "can be complied with *without* the court's ever *exercising dominion* over sovereign property." 699 F.3d at 262 (emphasis added). The Court then recited an unsupported finding that "Argentina had sufficient funds, *including over $40 billion in foreign currency reserves, to pay plaintiffs the judgments they are due*," *id.* at 263 (emphasis added), making plain that the Court understood that the injunctions would force Argentina to use its immune property "*to pay plaintiffs the judgments they are due*," and that the Court was prepared to disregard the heightened immunities given to the reserves or property held by a "foreign central bank . . . for its own account" pursuant to Section 1611(b)(1) of the FSIA.

refused to grant similar relief. For example, in *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian*, 218 Cal. App. 3d 1058 (1990), a judgment creditor sought an order directing a sovereign instrumentality of the Philippines to assign certain rights to receive payment outside the U.S. to the judgment creditor. The California Court of Appeal recognized that the "sole purpose [of the order] is to permit execution upon the debtor's property." *Id.* at 1098-99.

> To hold otherwise would be to ignore a longstanding immunity of international law and under the FSIA and to provide the creditor that which he could not straightforwardly achieve through ordinary creditors' remedies, namely, execution upon foreign property[.]

Id. at 1099. The Ninth Circuit followed the careful reasoning of *Chuidian* in *Peterson v. Islamic Republic of Iran*, and refused to order the assignment of offshore Iranian contract rights to a judgment creditor, concluding that such relief was appropriate only if the rights were "located in the United States." 627 F.3d at 1131-32. The court also emphasized that the FSIA's protections of sovereign immunity "apply *more strongly* in the context of immunity from execution" because enforcing judgments against a foreign state is rife with "*special sensitivities*." *Id.* at 1127-28 (emphasis added).

The Second Circuit itself has held that a court should not "grant, by injunction, relief which it could not properly provide by attachment." In *S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983), the Court warned that injunctions that side-step the FSIA

> result[] in the disingenuous flouting of the FSIA ban on prejudgment attachment of assets belonging to a "foreign state" . . . The FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property.

The injunctions here constitute exactly such "disingenuous flouting" of the FSIA. The Court offered as a justification the Republic's stated intention to "defy any money judgment issued by this Court," and therefore concluded that no adequate monetary remedy was available. 727 F.3d at 241. But a monetary remedy is plainly adequate, and indeed these injunctions, which direct the payment of billion-dollar money judgments, provide just such a remedy. And Argentina can avoid contempt only by surrendering rights of immunity conferred on its property by the FSIA, or by defaulting on its restructured bonds.

And this is where the injunctions become truly pernicious. Because the Court of Appeals cannot simply compel Argentina to pay, the exchange bondholders have been held hostage, and financial intermediaries (including global clearing systems located in Belgium and Luxembourg) conscripted on pain of contempt, to force Argentina to pay the holdouts. This is a "breathtaking" departure from the enforcement remedies made available by Sections 1609 and 1610 of the FSIA, a statute that does "not purport to authorize execution against a foreign sovereign's property . . . wherever that property is located around the world." *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) (stating that "[w]e would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction."); c*f. Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (noting the "presumption that United States law governs domestically but does not rule the world.").

B. The Injunctions Violate Fundamental Principles of Comity

Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

U.S. courts have long recognized that "[a] court should not issue an unenforceable injunction" purporting to limit the acts of a sovereign within its own borders, as such orders are both futile and offensive to principles of comity. *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 545 (9th Cir. 1996). This understanding flows from an international consensus that "any exercise of jurisdiction to enforce is subject to the principle of reasonableness." Restatement (Third) of the Foreign Relations Law of the United States § 431 cmt. d (1987); *see also id.* § 481 cmt. b ("Judgments granting injunctions . . . are not generally entitled to enforcement[.]"). The U.S. government has underscored "the strongly held view of many foreign states that they are not subject to coercive orders by a U.S. court," Br. for the United States as *Amicus Curiae* at 12, *Af-Cap,* 462 F.3d 417 (5th Cir. 2006) (No. 05-51168), and has warned that "U.S. foreign relations may be harmed by constraining a foreign state's use of its property[.]" U.S. *En Banc* Br. at 7-8.

The United States has stated that the United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res 59/38, U.N. Doc A/RES/59/38 (Dec. 2, 2004), which codifies that there shall be "no consequence" if one sovereign refuses to obey the orders of a court of another state, "reflect[s] current international norms and practices regarding foreign state immunity." Br. of the United States as *Amicus Curiae* in Support of Appellant at 22, *FG Hemisphere Assocs.*, 637 F.3d 373 (D.C. Cir. 2011)

(No. 10-7046), 2010 WL 4569107 (quoting Article 24 of the Convention).[11]

The actions of the courts below violate these principles by effectively dictating to Argentina that it must satisfy the judgments of the holdouts with immune assets.

II. THE INJUNCTIONS ARE PROFOUNDLY INEQUITABLE

The injunctions do not serve any legitimate equitable purpose. First, they exceed the proper bounds of equitable jurisdiction. Second, they unfairly give preferential treatment to the holdouts at the expense of the exchange bondholders, including the Exchange Bondholder Group, by threatening interruption of payments on their debt. And third, they threaten the public interest and make orderly restructuring of sovereign debt more difficult by creating perverse incentives that will encourage holdouts and discourage exchange offer participation.

By using the court's injunctive power to compel repayment of a debt, the injunctions starkly violate the limits of equity jurisdiction set out by this Court

[11] Mexico has signed (but not yet ratified) the Convention. A list of current signatories is available at https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en.

in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). There, certain holders of defaulted bonds obtained a provisional injunction, also based on a *pari passu* clause, restraining a defendant at risk of insolvency from dissipating its assets. This Court ruled that a federal court did not have equitable power to issue a preliminary injunction where plaintiff bondholders sought damages for breach of contract. Quoting Justice Story, the Court rejected the argument that "the grand aims of equity" created a general power to grant relief whenever legal remedies are not "practical and efficient." *Id*. at 321.

> "It is said," [Mr. Justice Blackstone] remarks, "that it is the business of a Court of Equity, in England, to abate the rigor of the common law. But no such power is contended for. Hard was the case of bond creditors, whose debtor devised away his real estate . . . . But a Court of Equity can give no relief . . . ."

Id. at 321-22 (quoting 1 Joseph Story, Commentaries on Equity Jurisprudence § 12, pp. 14-15 (1836)). The Court also rejected the argument that injunctive relief was justified because "equity is flexible," holding that "in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief," and that issuance of injunctive relief given these facts would be a rule "not of flexibility but of omnipotence." *Id*. at 322.

Just as there may be no remedy in the case of a sovereign breach, *see* discussion *supra* at 11-12, equity may not be invoked to create a remedy inconsistent with the FSIA. While bankruptcy regimes in the private sector provide detailed mechanisms for achieving intercreditor equity, no such regimes exist in the sovereign context except to the extent intercreditor equity can be achieved by agreement through exchange offers. It is in this context that the FSIA's limitations on enforcement come into play and provide incentives for participating in an exchange offer.[12] Choosing to pursue one's enforcement remedies through litigation instead of participating in an exchange offer should not, however, entitle a creditor to circumvent the limitations imposed by the FSIA that the choice brings with it.

Secondly, the injunctions are unfair to the exchange bondholders, including the Exchange Bondholder Group, who received deeply discounted debt with extended maturities in exchange for their defaulted bonds. The injunctions have caused real-time economic harm to the market value of the their

---

[12] Academic commentators have noted that sovereign immunity regimes, such as the FSIA, "offer[] a shield akin to bankruptcy protection and encourage[] most creditors to compromise." Anna Gelpern, Peterson Inst. for Int'l Econ., No. PB13-12, Sovereign Damage Control 1 (2013), *available at* http://www.iie.com/publications/pb/pb13-12.pdf.

investments, have placed the servicing of their debt in jeopardy, and have placed them at risk of a catastrophic default. Equitable remedies are inappropriate when they harm or threaten to harm innocent third parties.

This Court has recognized "fundamental limitations on the remedial powers of the federal courts," which permit their exercise "only on the basis of a violation of the law." *Gen. Bldg. Contractors Ass'n, Inc. v. Penn.*, 458 U.S. 375, 399 (1982). A nonparty's lawful conduct that is "independent" of a party's wrongful conduct falls outside the scope of a federal court's injunctive power. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945); *cf. Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (Holmes, J.) ("In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders.").

Third, by increasing holdout leverage, dramatically changing the incentives for participating in an exchange offer, and increasing the risk that the servicing of restructured debt can be interrupted, the Second Circuit's decision contravenes public policy.

Doctrines of equity and contract interpretation recognize that "contracts or agreements affecting the public interest" should be "liberally construed in favor of the public." 11 R. Lord, Williston on Contracts § 32:18 (4th ed. 2002). This analysis does not change because an injunction is characterized as one for "specific performance." *See* George Luther Clark, Equity: An Analysis and Discussion of Modern Equity Problems § 169 (1919)[13] (noting that "hardship on persons other than the defendant has been an element in refusing specific performance"); *see also United States v. Alexander*, 736 F. Supp. 1236, 1242 (N.D.N.Y. 1989), *aff'd*, 901 F.2d 272 (2d Cir. 1990) (specific performance "will not be ordered if under all the circumstances it would be inequitable to do so"). Here, the public interest favors application of traditional remedies for breach of contract instead of injunctive relief that imperils principles of sovereign immunity and places at risk the orderly restructuring of sovereign debt.

III. COLLECTIVE ACTION CLAUSES DO NOT ELIMINATE FUTURE HOLDOUT THREATS TO THE ORDERLY RESTRUCTURING OF SOVEREIGN DEBT

In its October 2012 opinion, the Second Circuit assumed that its decision would not enhance the leverage of holdouts in future debt restructurings because "[c]ollective action clauses—which effectively eliminate the possibility of 'holdout' litigation—have been included in 99 percent of the aggregate value of New York-law bonds issued since

---

[13] *Available at* https://archive.org/details/equityananalysi02clargoog.

January 2005[.]" 699 F.3d at 264. Mexico strongly disagrees with this conclusion.

In the private sector, bankruptcy regimes exist pursuant to which, under court supervision, a debtor can make orderly and equitable payments to its creditors based on its ability to pay. No similar regime exists to assist a sovereign debtor which has encountered a liquidity or insolvency crisis. As a consequence, a sovereign debtor must rely on a consensual restructuring of its debt through exchange offers in order to reduce its debt service obligations to a level consistent with its balance of payments profile.[14]

Mexico believes that the Second Circuit's decision will render the orderly restructuring of sovereign debt much more difficult by increasing holdout leverage and discouraging exchange offer participation. Bondholders will be understandably concerned that holdout creditors may be able to disrupt the flow of payments on restructured debt, or believe that, by holding out, they might be able to obtain a significant premium over the amount to be received by a tendering bondholder. The United

---

[14] *See* IMF, Sovereign Debt Restructuring—Recent Developments and Implications for the Fund's Legal and Policy Framework ¶ 7 (Apr. 26, 2013) (hereinafter "2013 IMF Report"), *available at* https://www.imf.org/external/np/pp/eng/2013/042613.pdf.

States has similarly warned that "[c]reditors are less likely to agree to a restructuring if the sovereign may be prohibited from servicing its restructured debt," U.S. 2004 Br. at 16, that the injunctions "dramatically tilt the incentives away from consensual, negotiated restructuring," U.S. Panel Br. at 17, and that "[i]f enough creditors adopt this strategy, foreign sovereign debt restructuring will become impossible," U.S. *En Banc* Br. at 4. The IMF has also expressed its concern that the injunctions "risk undermining the sovereign debt restructuring process."[15]

CACs as they now exist do not eliminate those disincentives. CACs were developed just over a decade ago to "reduce the risk that holdout creditors pose to the sovereign bond restructuring process." *See* IMF, Collective Action Clauses in Sovereign Bond Contracts—Encouraging Greater Use 2 (June 6, 2002).[16] In September 2002, a G-10 task force, led

[15] 2013 IMF Report ¶ 44. The IMF Report examined the negative implications of the Second Circuit's decision, took issue with the decision's conclusions with respect to CACs, and recommended the development of CACs with more "robust aggregation clauses." 2013 IMF Report at 2 & ¶¶ 43-44; *see also id.* ¶ 44 n.34 (noting that the Second Circuit's holding is already manifesting itself in litigation that may frustrate other restructuring efforts, citing *Export-Import Bank of the Republic of China v. Grenada*, No. 13 Civ. 1450 (S.D.N.Y. 2013)).

[16] *Available at* https://www.imf.org/external/np/psi/2002/eng/060602a.pdf.

by the United States and formed to develop a market-based solution to the holdout problem, issued a report that recommended the use of CACs as a mechanism to facilitate the orderly and voluntary restructuring of debt without disruptive litigation. *See* Group of Ten, Report of the G-10 Working Group on Contractual Clauses 4 (Sept. 26, 2002) (noting the concern that a "vulture fund" could "hold up a [restructuring] process that a reasonable majority supported.").[17] The IMF thereafter continued supporting CACs as a mechanism for facilitating the restructuring of sovereign debt. *See* IMF, Collective Action Clauses: Recent Developments and Issues (Mar. 5, 2003).[18]

In March 2003, Mexico became the first sovereign bond issuer to issue New York-law bonds containing CACs. *See* W. Mark C. Weidemaier & Mitu Gulati, *A People's History of Collective Action Clauses*, 54 Va. J. Int'l L. 51, 57 (2013) (symposium). Many other countries adopted similar clauses in the wake of Mexico's actions.

Obviously, given the long maturity profile of sovereign bonds, many bonds without CACs remain

[17] *Available at* http://www.bis.org/publ/gten08.pdf.

[18] *Available at* http://www.imf.org/external/np/psi/2003/032503.pdf.

outstanding, and will not mature for many years.[19] Mexico itself currently has approximately $5 billion in U.S.-dollar denominated debt outstanding without the protections afforded by CACs, with maturity dates between 2016 and 2031.

More fundamentally, even when CACs exist, they do not eliminate the risks posed by holdout creditors. A critical shortcoming is that CACs typically bind only bondholders within the same issuance or series. Thus, if a single holdout creditor is able to acquire a blocking percentage of a particular bond series, that creditor can effectively neutralize the operation of the CAC governing that series. *See* 2013 IMF Report ¶ 44. The risk that one or more series might not achieve the requisite majority could also imperil a broader restructuring.[20]

---

[19] *See* U.S. *En Banc* Br. at 4; *see also* Michael Bradley, James D. Cox & Mitu Gulati, *The Market Reaction to Legal Shocks and Their Antidotes: Lessons from the Sovereign Debt Market*, 39 J. Legal Stud. 289, 305 (2010) (delineating sovereign debt issued with and without CACs between 1986 and 2007).

[20] To address these problems, the European Union now requires all government debt issued by member states to have CACs with cross-series aggregation features. *See* Treaty Establishing the European Stability Mechanism (ESM), Feb 2, 2012, ch. 4, art. 12, ¶3, 2011 O.J. (L 91), *available at* http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf.

The recent sovereign debt restructuring in Greece demonstrated the shortcoming of CACs without cross-series aggregation. Of the thirty-six bond series with CACs that were eligible to participate in the Greek debt restructuring, only seventeen were successfully restructured using CACs. The operation of CACs in the remaining bonds was effectively nullified by holdout creditors, resulting in unrestructured claims of about EUR 6.5 billion, accounting for 30 percent of the total value of debt governed by foreign law. 2013 IMF Report ¶ 37.[21]

Moreover, even if a new generation of CACs with more robust aggregation mechanisms were adopted tomorrow, the extended maturity profile of sovereign debt means that the Second Circuit's decision is likely to haunt any effort to restructure a country's external debt for the foreseeable future.

---

[21] The market has recognized that CACs without aggregation features are flawed, and issues raised by alternative approaches to aggregation are being actively explored by official and private sector participants in the sovereign debt markets. Industry groups are actively engaged in pursuing that development. *See* Int'l Capital Markets Ass'n ("ICMA"), Sovereign Bond Consultation Paper (Dec. 2013), *available at* http://www.icmagroup.org/assets/documents/Maket-Practice/Regulatory-Policy/Sovereign-Debt-Information/ICMA-Sovereign-Bond-Consultation-Paper-79801-5-863-v1-8-161213.pdf.

CACs are not "a talisman" that "can ward off the great problems associated with massive sovereign borrowing in interconnected global markets." Weidemaier & Gulati, 54 Va. J. Int'l L. at 84. Mexico believes that existing CACs will not entirely prevent threats to orderly future debt restructurings, and strongly disagrees with the Second Circuit's conclusion that CACs would effectively eliminate the possibility of holdout litigation.

CONCLUSION

The Second Circuit's affirmation of extraordinary injunctive relief upsets settled doctrines of sovereign immunity, and risks destabilizing the international monetary system by creating incentives that imperil future sovereign debt restructurings. Mexico submits, therefore, that the decision of the Second Circuit merits further review by this Court.

Respectfully submitted,

JAMES L. KERR
Counsel of Record
KAREN E. WAGNER
DANIEL T. YOUNG
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, N.Y. 10017
james.kerr@davispolk.com
(212) 450-4000

March 24, 2014 *Counsel for Amicus Curiae*